91-1894

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

TRUITT V. LIVELY,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR UNITEDBANK-HOUSTON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE JUDGMENT BELOW, RELYING ON U.S.C. 12 § 1821(d) (2) (A) and (B), INCORRECTLY HELD THAT THE GUARANTY AGREEMENT EXTENDED TO THE FDIC AS RECEIVER FOR UNITEDBANK-HOUSTON. THE QUESTION PRESENTED IS WHETHER THIS HOLDING CONTRAVENES THE WELL-SETTLED LAW OF THE SUPREME COURT OF THE STATE OF TEXAS WHICH HOLDS THAT A GUARANTY MUST BE STRICTLY CONSTRUED AND MAY NOT BE EXTENDED BEYOND ITS PRECISE TERMS BY CONSTRUCTION OR IMPLICATION.

II.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE JUDGMENT BELOW HELD THAT THE FORECLOSURE SALE WAS PROPER AND COMPLIED WITH THE REQUIREMENTS OF THE TEXAS PROPERTY CODE, EVEN THOUGH THE PROPERTY DESCRIPTION IN THE NOTICE OF TRUSTEE'S SALE WAS INACCURATE. THE QUESTION PRESENTED IS WHETHER THE FIFTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH LAW OF THE NINTH CIRCUIT IN *IN RE NORMA C. WORCESTER, DEBTOR*, 811 F2d 1224 (9th Cir. 1987), WHICH HOLDS THAT AN INACCURATE DESCRIPTION OF PROPERTY IN NOTICE OF TRUSTEE'S SALE IS A MATERIAL IRREGULARITY RESULTING IN A GROSSLY INADEQUATE CONSIDERATION AND A VOID SALE.

PARTIES

The parties to this case are the Federal Deposit Insurance Corporation, as Receiver for UNITEDBANK-HOUSTON and Truitt V. Lively, individually and as President of Gettysburg Corporation, which corporation, although named as a defendant, was never properly served.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Truitt V. Lively (hereinafter Petitioner), petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 9, 1992.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is reproduced as Appendix A. The opinion of the United States District Court for the Southern District of Texas, Houston Division, is

reproduced as Appendix B and is reported at 760 F. Supp. 115 (S.D. Tex. 1990).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 9, 1992. Order of Court of Appeals For Fifth Circuit was entered on February 27, 1992, denying Petitioner's Petition For Rehearing.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) which governs review of cases from the Court of Appeals.

STATUTORY PROVISIONS INVOLVED

Statutes:

12 U.S.C. § 1821(d)

> (d) Powers and duties of Corporation as conservator or receiver. (1) Rulemaking authority of Corporation. The Corporation may prescribe such regulations as the Corporation determines to be appropriate regarding the conduct of conservatorships or receiverships. (2) General powers. (A) Successor to institution. The Corporation shall, as conservator or receiver, and by operation of law, succeed to –
>
> (i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder,

depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

(B) Operate the institution. The Corporation may, as conservator or receiver –

(i) take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the directors, and the officers of the institution and conduct all business of the institution;

(ii) collect all obligations and money due the institution;

(iii) perform all functions of the institution in the name of the institution which is consistent with the appointment as conservator or receiver; and

(iv) preserve and conserve the assets and property of such institution.

§ 51.002(b) of the Texas Property Code

(b) Notice of the sale must be given at least 21 days before the date of the sale:

(1) by posting at the courthouse door of each county in which the property is located a written notice designating the county in which the property will be sold;

(2) By filing in the office of the county clerk of each county in which the property is located a copy of the notice posted under Subdivision (1); and

(3) By the holder of the debt to which the power of sale is related serving written notice of the sale by certified mail on each debtor who, according to the records of the holder of the debt, is obligated to pay the debt.

STATEMENT OF THE CASE

On or about September 27, 1985, Gettysburg Corporation ("Gettysburg"), through its president, Truitt V. Lively, Petitioner, herein ("Petitioner"), executed and delivered to UNITEDBANK-HOUSTON (UBH) a promissory note in the amount of $926,926.56 and a deed of trust on real property owned by Gettysburg. Also, on or about October 3, 1985, after the date the note was signed on September 27, 1985, Petitioner executed a personal guaranty of debts owed by Gettysburg to UBH. The note matured on March 28, 1986, but was extended on June 10, 1986, to March 28, 1987, by an agreement executed by Petitioner as president of Gettysburg.

UBH was a state chartered banking association operating under the laws of the State of Texas. On April 30, 1987, however, the Texas Banking Commissioner declared UBH insolvent and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver for UBH.

After the note matured on March 28, 1987, the FDIC as Receiver refused to negotiate a renewal with Petitioner

and on October 6, 1987, FDIC foreclosed on the real property securing the payment of the note. The real property collateral was sold for $170,000.00.

FDIC as receiver filed suit against Gettysburg and Petitioner on November 15, 1988, in the 270th Judicial District Court of Harris County, Texas. The original petition sought the recovery of the deficiency of $719,168.52 and interest. Gettysburg was never served and the suit was prosecuted only against Petitioner. The District Court in fact, in its final judgment did not officially dismiss Gettysburg from this suit.

On September 28, 1989, the FDIC as receiver, pursuant to Financial Institution Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183, removed this action to the United States District Court for the Southern District of Texas, Houston Division.

On July 2, 1990, the District Court entered an order allowing Petitioner to file his Third Amended Original Answer and Counter Claim against FDIC as receiver after Gettysburg assigned all of its claims against FDIC to Petitioner on April 28, 1990.

On August 31, 1990, FDIC moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The District Court granted the FDIC's motion and entered its Order and Final Judgment against Petitioner on December 7, 1990, in the sum of $719,168.52 plus accrued pre-judgment interest of $270,763.88 as of September 30, 1990, additional pre-judgment interest, accruing at the rate of $249.67 per diem until judgment and, post judgment interest at the rate of 7.28% per annum, plus attorney's fees of $25,000.00.

The District Court on February 28, 1991, overruled Petitioner's Motion For New Trial.

Petitioner on March 25, 1991, timely filed a Notice of Appeal to the United States Courts for the Fifth Circuit. Petitioner's Brief was filed on July 18, 1991, in the Fifth Circuit under Cause No. 91-2309. On January 9, 1992, the Fifth Circuit affirmed the judgment of the United States District Court for the Southern District of Texas.

Petitioner on January 21, 1992, timely filed Petition For Rehearing to the Fifth Circuit which motion was denied on February 27, 1992.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE JUDGMENT BELOW, RELYING ON 12 U.S.C. § 1821(d) (2) (A) and (B) INCORRECTLY HELD THAT THE GUARANTY AGREEMENT EXTENDED TO THE FDIC AS RECEIVER FOR UNITEDBANK-HOUSTON; THE QUESTION PRESENTED IS WHETHER THIS HOLDING CONTRAVENES THE WELL-SETTLED LAW OF THE SUPREME COURT OF TEXAS WHICH HOLDS THAT A GUARANTY MUST BE STRICTLY CONSTRUED AND MAY NOT BE EXTENDED BEYOND ITS PRECISE TERMS BY CONSTRUCTION OR IMPLICATION.

The Fifth Circuit, in summarily affirming the lower court, held that a guaranty agreement[1] which contains the following limitations as to the liability of the guarantor:

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[1] Included as Appendix E.

> "19. Wherever used herein, . . . ; the word 'Bank' or 'Creditor' refers to UNITEDBANK-HOUSTON, Houston, Texas, its corporate successors and where its assigns any of the indebtedness, then so far as the assigned portions thereof is concerned, its assigns . . . "

would further extend to the FDIC because the FDIC "succeeded" UBH by virtue of UBH's insolvency and the FDIC's subsequent appointment as receiver by the Texas Banking Commissioner.

The FDIC argued in its motion for summary judgment to the trial court that it was a "corporate successor" to UBH, which was obviously a futile claim. Then the FDIC by relying on 12 U.S.C. Section 1821(d) (2) (A) and (B), attempted to establish a new fourth category of "Statutory Successor" to which the guaranty agreement extended.

The Fifth Circuit, by adopting the position of the FDIC that a new and fourth category of "Statutory Successor" was appropriate, incorrectly extended enforcement of the guaranty agreement to the FDIC.

The Fifth Circuit erred in affirming the existence of and extending by implication such a "Statutory Successor" category to the unambiguous provisions of the guaranty agreement because the guaranty is expressly limited to three precise successor entities, none of which includes a "Statutory Successor". In its holding in *Federal Deposit Insurance Corporation v. Woolard*, 889 F.2d 1477 (5th Cir. 1989), the Fifth Circuit, citing *Reece v. First State Bank of Denton*, 566 S.W.2d 296, 297 (Tex. 1978), upheld the general rule of Texas that a guaranty agreement is to be strictly construed and may not be extended beyond its

precise terms by construction or implication. A strict construction of the guaranty agreement in this case as required under Texas law would disallow an extension of the guaranty to the FDIC as "Statutory Successor" because it would be beyond the express and precise terms of the guaranty agreement.

The Court in *Woolard* further stated that the addendum guaranty in that case was not ambiguous and was so worded that it could be give a certain or definite legal meaning or interpretation and thus construed the contract as a matter of law citing *Coker v. Coker,* 650 S.W.2d 391, 393 (Tex. 1983).

All of the guaranty's terms of limitation in this case make specific reference to three distinct and precise entities. Hence, an extension of the guaranty by the Courts below to FDIC as a "Statutory Successor" could only have been accomplished by construction, implication or presumption which is wholly contrary to Texas law. Strict construction has been defined as:

> "Strict (or literal) construction is construction of a statute or other instrument according to its letter, which recognizes nothing that is not expressed, takes the language used in the exact and technical meaning and admits no equitable consideration or implication."

Black's Law Dictionary, (Sixth Ed., West Publishing Company 1990) at p. 313.

The Supreme Court of Texas in *General American Indemnity Company v. Pepper,* 339 S.W.2d 660 (Tex. 1960), held that it is well established that a contract is to be construed in accordance with its plain language, citing

Marlin Associates v. Trinity Universal Insurance Co., Tex. Civ. App., 226 S.W.2d 190, 194, no writ hist., where the court quotes 12 Am. Jur. Sec. 228, p. 749:

> "A court is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a contract for the parties – that is, a contract different from that actually entered into by them. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or the imposition upon one party to a contract of an obligation not assumed."

Petitioner submits that the decisions below are so clearly wrong that a summary reversal on this point should be granted in favor of Petitioner.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE JUDGMENT BELOW HELD THAT THE FORECLOSURE SALE WAS PROPER AND COMPLIED WITH THE REQUIREMENTS OF THE TEXAS PROPERTY CODE, EVEN THOUGH PETITIONER'S CONTROVERTING EVIDENCE SHOWED THAT THE PROPERTY DESCRIPTION IN THE NOTICE OF TRUSTEE'S SALE WAS INACCURATE. THE QUESTION PRESENTED IS WHETHER THE FIFTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH LAW OF THE NINTH CIRCUIT IN *IN RE NORMA C. WORCESTER, DEBTOR*, 811 F.2d 1224 (9th Cir. 1987), WHICH HOLDS THAT AN INACCURATE DESCRIPTION OF PROPERTY IN NOTICE OF TRUSTEE'S SALE IS A MATERIAL IRREGULARITY RESULTING IN A GROSSLY INADEQUATE CONSIDERATION AND A VOID SALE.

The Supreme Court of State of Texas held in *American Savings & Loan Assn. v. Musick*, 531 S.W.2d 581, 587 (Tex.

1975) that a wrongful foreclosure sale caused by a grossly inadequate consideration must have some irregularity in the sale which caused, contributed to, or might have caused or contributed to the gross inadequacy.

The Fifth Circuit adopted this rule of law in *Savers Federal Savings & Loan Association v. Reetz*, 888 F.2d 1497, 1503 (5th Cir. 1989).

The Fifth Circuit affirmed in this case the holding of the District Court that the foreclosure sale was proper, thereby, holding that an improper property description in the notice of substitute trustee's sale was not an irregularity in the foreclosure sale.

The notice of substitute trustee's sale[2], in this case, included along with 34 residential lots, one additional residential lot containing a residence valued at more than $100,000.00. The substitute trustee in the substitute trustee's deed[3], having discovered his error in the sale, removed this lot out of the description in the deed. The court in *Crow v. Davis*, 435 S.W.2d 176 (CA-Waco 1968) held that an irregular property description is sufficient to set aside a trustee's deed where a foreclosure sale is made for a grossly inadequate consideration. The inaccurate description, in this case, could have caused a chilling of the bidding at the foreclosure sale.

The holding by the Fifth Circuit conflicts with the holding of the Ninth Circuit in *In Re Norma C. Worcester Debtor*, 811 F.2d 1224, 1232 (9th Cir. 1987) which holds

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[2] Included as Appendix F.

[3] Included as Appendix G.

that an inaccurate description in notice of trustee's sale is a material irregularity.

The sales price of the 34 lots was $170,000.00. Petitioner filed a sworn affidavit[4] in his response to FDIC's Motion For Summary Judgment that the value of the 34 lots on the date of foreclosure sale was $748,000.00. The foreclosure sale in this case was made for a grossly inadequate consideration.

Further, FDIC did not give at least 21 days notice to Gettysburg or Petitioner prior to the trustee's sale as required by Section 51.002(b), Texas Property Code. The notice given was only 20 days notice. Judge Robert C. McGuire, in *In Re Michael Lane Nelson, Debtor,* Case No. 390-34532 RCM-11, United States Bankruptcy Court, Northern District of Texas, Dallas County, addressed the 21 day notice requirement and held the foreclosure was void because there was only 20 days notice given.

Further, FDIC could not conduct a proper foreclosure sale under the terms of the deed of trust which set the time of sale to be between the hours of 10:00 *P.M.* and 4:00 P.M. The Supreme Court of Texas in *Fuller v. O'Neal,* 69 Tex. 349, 6 S.W. 181 (1887), held that the trustee under a deed of trust must follow the direction of the grantor, to have the proper notice of the sale given and have it take place at the time and place appointed by grantor.

FDIC's only remedy was to judicially foreclose on the 34 lots which they did not do.

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[4] Included as Appendix H.

This Court should remand this case to the District Court for a trial to determine the true amount of deficiency created by the void foreclosure sale.

CONCLUSION

For all the reasons set forth herein, Petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit. Petition submits that it is appropriate for this Court to make a summary disposition on the merits pursuant to Sup. Ct. R. 16.1 and reverse and remand the case to the District Court for resolution of any remaining issues.

Respectfully submitted,

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DATED: May 26, 1992.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2309
Summary Calendar

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for UNITEDBANK-HOUSTON, ET AL.,

Plaintiff-Appellee,

versus

GETTYSBURG CORPORATION,

Defendant,

TRUITT V. LIVELY,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

(CA H 89 3081)

(January 9, 1992)

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:

The FDIC brought suit against Lively to enforce his personal guaranty of Gettysburg's obligation to the bank to pay the principal and interest due on the note. The district court granted summary judgment in favor of the FDIC and awarded the balance owed under the note plus interest and attorney's fees.

On appeal, Lively argues mainly that the guaranty is unenforceable because the bank notary materially altered it. He also argues that the guaranty is ambiguous, that it does not extend to the FDIC and that it calls for the sale of the collateral to satisfy the full amount owed on the note. Lively further argues that there were irregularities in the notice and conduct of the foreclosure sale. He also contends that the FDIC miscalculated the amount of principal and interest owed. Finally, he argues that the district court improperly awarded attorney's fees. We hold that none of Lively's arguments have any merit, and, therefore, we affirm the order of the district court.

I

On September 27, 1985, Gettysburg executed a promissory note to UnitedBank-Houston ("UBH") in the amount of $926,926.56. Gettysburg also executed a deed of trust on real property owned by Gettysburg. Also, on or about September 27, 1985, Lively, the president of Gettysburg, executed a personal guaranty of all debts owed by Gettysburg to UBH.

In 1987, UBH became insolvent and the FDIC was appointed receiver. Gettysburg and Lively defaulted on

the note and the guaranty. The FDIC as receiver appointed a substitute trustee under the deed of trust. The trustee gave notice of the foreclosure sale on September 15, 1987, and the foreclosure sale took place on October 6, 1987. The collateral property was sold for $170,000.00. After the proceeds of the sale were applied to the balance due on the note, a $794,691.15 deficiency remained.

II

On November 15, 1988, the FDIC brought suit against Lively and Gettysburg in state court to recover the amount owed under the note and guaranty. In September of 1989, the FDIC removed the action to federal district court. The FDIC filed a motion for summary judgment and the federal district court granted it and entered an order and judgment awarding the FDIC $719,168.52 plus interest and $25,000 for attorney's fees. Lively now appeals the district court's judgment.

III

Lively raises several arguments on appeal, none of which have any merit. His central argument is that he actually signed the guaranty on October 3, 1987, and an officer at UBH filled in the date on the guaranty as September 27, 1987, the same day the note was executed. Lively argues that this back-dating was a material alteration, and that therefore, the guaranty cannot be enforced. In connection with this argument, he argues that the district court prevented him from discovering documents that would have shown that the guaranty was materially altered.

Lively also argues that the guaranty was ambiguous and that it did not extend to the FDIC. He contends that there was a factual question as to who owned the note and guaranty, the FDIC in its receivership capacity or the FDIC in its corporate capacity. He further argues that there was a factual question as to the amount of principal and interest owing under the note. Lively also argues that there were various irregularities in the notice and conduct of the foreclosure sale. Finally, Lively contends that the district court erred in granting the FDIC attorney's fees.

IV

Summary judgment is appropriate when "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is proper "unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (internal citations omitted). The opposing party must designate specific facts showing there is a material factual issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). We hold that Lively has presented no genuine issue of material fact and, therefore, we affirm the district court's order granting the FDIC summary judgment.

V

Lively alleges that the bank notary materially altered the guaranty by back-dating it, and that, consequently,

the guaranty cannot be enforced. Lively argues that the alteration was material because it had the effect of making the guaranty apply to the amount owed under the note. We agree with the FDIC that the back-dating, if it did occur, was not a material alteration because the guaranty covered past and future obligations, making the execution date irrelevant. The guaranty provides that "I guaranty unconditionally and promise to pay to Creditor or its order . . . each item of indebtedness hereby guaranteed. . . . " The guaranty defines indebtedness as "financing accommodation of any kind" and confirms Lively's assent to all terms and agreements *heretofore* or hereafter made by the Debtor with the Creditor." Therefore, Lively guaranteed the amount owed under the note irrespective of when he actually executed the guaranty.

Furthermore, Lively's material alteration defense is barred by the doctrine developed in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and its progeny.[1] In *D'Oench, Duhme*, the Supreme Court held that a borrower cannot assert defenses against the FDIC that are based on unrecorded agreements with a failed bank. *Id.* at 459-60. The doctrine "allows the FDIC to rely on the official bank records, to the exclusion of any extraneous matters, to set forth the rights and obligations of the bank and those to whom it lends money." *FSLIC v. Griffin*, 935 F.2d 691, 697 (5th Cir. 1991).

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[1] The district court held that Lively's defenses based on the alteration are also barred by 12 U.S.C. § 1823(e) and the federal holder in due course doctrine. Because we hold that Lively's defenses are barred by *D'Oench, Duhme*, we do not decide if they are also barred by § 1823(e) and the federal holder in due course doctrine.

This court has previously held that *D'Oench, Duhme* bars a maker of a note from asserting a fraud defense against the FDIC or the FSLIC in cases where the "maker lent himself to a scheme or arrangement whereby the banking authority on which [the FDIC or FSLIC] relied in insuring the bank was or was likely to be misled." *FDIC v. McClanahan*, 795 F.2d 512, 515 (5th Cir. 1986) (quoting *D'Oench, Duhme*, 315 U.S. at 460). In *McClanahan*, this court rejected the defense that the bank had fraudulently completed a promissory note executed in blank by the borrower leaving him ignorant of the actual terms of the obligation. The court found that the borrower had lent himself to a misleading scheme and that he therefore could not assert fraud as a defense. *McClanahan*, 795 F.2d at 516. In *FSLIC v. Murray*, 853 F.2d 1251, 1254-55 (5th Cir. 1988), the borrowers claimed that their executed, blank signature pages were fraudulently affixed to documents different from the ones intended by them. This court found that these borrowers also lent themselves to a scheme which was likely to mislead the banking authority, and that they therefore could not assert this defense. *Id.* at 1255.

In his affidavit, Lively stated:

> I signed this guaranty agreement at the request of the [bank notary] and after leaving the bank, she must have filled in the date of September 27, 1985, and notarized the signature by signing in the place provided for the notary and dated the acknowledgment as of September 27, 1985.

Clearly, Lively lent himself to a scheme that was likely to be misleading, and, therefore, his material alteration

defense is barred by *D'Oench, Duhme*. His lack of consideration defense is barred by *D'Oench, Duhme* for the same reason. *See McClanahan*, 795 F.2d at 514-516. Because we hold that Lively's defenses based on the alleged alteration of the date are barred by *D'Oench, Duhme*, his argument that the district court erred in preventing him from discovering documents which would have proved the date was altered has no merit.

VI

The district court held that the guaranty was not ambiguous that the FDIC as receiver was the owner, that the guaranty did not require the FDIC to satisfy the balance of the note from the sale of the collateral, and that the guaranty extends to the FDIC as receiver. The district court also held that the foreclosure sale was proper and complied with the requirements of the Texas Property Code. Finally, the district court held that the FDIC properly calculated the principal and interest owed on the note. We summarily affirm these holdings of the district court.

VII

On appeal, Lively argues that the district court erred in granting the FDIC $25,000 in attorney's fees when the FDIC did not detail the time spent on the legal work or the legal rate. The award of attorney's fees, however, was based on a provision in the guaranty that the debtor would pay 15% of the sum owed to the bank as legal fees. Such agreements are enforceable under Texas law. *F.R.*

Hernandez Constr. & Supply Co. v. National Bank of Commerce, 578 S.W.2d 675, 676 (Tex. 1979). Under Texas law, the bank is entitled to the stipulated amount without a showing that the fees are reasonable. Upon a proper showing that the fees are unreasonable, the fee should be reduced. *Id.* at 677. In order to prove the fees are unreasonable, "the obligor must also prove a lesser amount that is reasonable under the circumstances." *Id.* Lively failed to offer any evidence that the fee was unreasonable or that an alternative fee was more appropriate. Thus, the district court properly awarded $25,000 in attorney's fees to the FDIC. Therefore, for the foregoing reasons, the order and judgment of the district court are

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2309

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for UNITEDBANK -- HOUSTON, ET AL.,

Plaintiff-Appellee,

versus

GETTYSBURG CORPORATION,

Defendant,

TRUITT V. LIVELY,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(February 27, 1992)

Before JOLLY, DAVIS and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FEDERAL DEPOSIT INSURANCE CORP.,	§	
	§	
Plaintiff	§	
	§	CIVIL ACTION
VS.	§	NO. H-89-3081
GETTYSBURG CORPORATION, et al.,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

The Court having GRANTED Plaintiff's motion for summary judgment hereby enters its

JUDGMENT that Plaintiff have and recover from Defendant Lively the sum of $791,168.52 plus accrued pre-judgment interest of $270,763.88 as of September 30, 1990 and additional interest thereafter of $249.27 per diem until the date of judgment together with reasonable attorney's fees in the amount of $25,000.00 plus post-judgment interest at the legal rate of 7.28% per annum from the date of judgment until paid.

This is a FINAL JUDGMENT.

Signed this 7th day of December, 1990 at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FEDERAL DEPOSIT INSURANCE CORP.,	§	
	§	
Plaintiff	§	
	§	CIVIL ACTION
VS.	§	NO. H-89-3081
GETTYSBURG CORPORATION, et al.,	§	
	§	
Defendants.	§	

ORDER

Pending before the Court is a motion for summary judgment filed by Plaintiff Federal Deposit Insurance Corporation ("FDIC") as receiver for the former United-Bank-Houston ("United"). After consideration of said motion and Defendant Lively's response as well as the affidavits and exhibits filed in support thereof, this Court is of the opinion that Plaintiff's motion should be granted.

Plaintiff has brought this suit to collect on a promissory note executed by Defendant Gettysburg Corporation ("Gettysburg") payable to Plaintiff's predecessor for $926,926.56. The note was secured by a Deed of Trust and the personal unconditional guaranty of Defendant Lively, President of Gettysburg. The note matured on March 28, 1986 and was later extended by agreement. After Defendants defaulted on the note and demand made, the FDIC

foreclosed on the property securing the note. This litigation is for the collection of the remaining deficiency of $794,691.15 plus interest.

Defendant Gettysburg has not been served because according to the Secretary of State's records it is an inactive corporation. Defendant Lively defends on the following grounds: 1) lack of consideration, 2) the FDIC is not the owner and holder of the note, 3) the FDIC in its corporate capacity owning the note, 4) the guaranty is materially altered, 5) the guaranty covered only future debt, 6) the guaranty is ambiguous and limited and did not extend to the FDIC, 7) accord and satisfaction, 8) economic duress, 9) estoppel, 10) laches, 11) payment, 12) relief, 13) statute of frauds, 14) statute of limitations, 15) conditions precedent, and 16) Lively signed the note in his capacity as officer and not individually. Lively has also raised the following counterclaims: 1) wrongful foreclosure, 2) corporate owned the note but receiver filed suit, 3) FDIC failed to ask Trustee named in the security agreement to act at foreclosure, 4) no proper notice of foreclosure, 5) sale was made at the wrong time, 6) the price at sale was deficient, 7) duty of good faith and fair dealing, and 8) bad faith.

Summary judgment is authorized if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The United States Supreme Court has interpreted this rule to mandate the entry of summary judgment after an adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that

party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In the present case Plaintiff has the burden of proof concerning Defendant's obligation to pay the alleged debt. It is undisputed that on September 25, 1985, Defendant Gettysburg, by and though [sic] its President Truitt V. Lively executed a promissory note payable to United. The note was secured by a Deed of Trust and the personal guarantee of Defendant Lively. The Deed of Trust allows for the appointment of a Substitute Trustee at the beneficiaries discretion. The agreements between the Bank and Gettysburg and/or Lively are complete and in writing. *See* 12 U.S.C. § 1823(e) and *"D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

The note matured on March 28, 1986 but was extended by agreement. However, Defendants defaulted in payment of the extension note and after demand was made and with notice to the debtor the property was sold at a foreclosure sale on October 6, 1987. The evidence shows that the foreclosure sale was proper and complied with the requirements of the Texas Property Code. In addition, the notice conformed with the statutory requirements.

The property was placed for bid based on an appraisal and bid at or above 70% of the appraised value. The highest bid of $170,000.00 was made by a trustee for defendant Lively. This amount was applied first to the interest owed and then to the principal. The Court finds that this bid, which was over 85% of the appraised value, is not deficient. A lower than expected price at a foreclosure sale does not mean there were irregularities in the

sale. *Greater Southwest Office Park, Ltd. v. Texas Commerce Bank National Association,* 786 S.W.2d 386 (Tex. Civ. App. – Houston [1st Dist., 1990]). Furthermore, contrary to Defendant's belief, an ordinary lender/borrower relationship does not create a fiduciary duty. *FDIC v. Coleman* (no. C-8272) (Tex. 1990).

There remains due and owing a deficiency of $794,691.15 plus accrued interest. The FDIC has submitted the affidavit of Kenton M. Sigle, account officer, which shows all payments made by Defendants, if any, have been credited and Defendants have received all offsets and credits due them. Defendants have failed to produce any material evidence to the contrary. In addition, there is nothing in the bank records showing the FDIC has an obligation to collect on any other notes in connection with this note or that this note was allegedly written to replace other notes. Finally, there is no evidence that the FDIC was required to pay the note in full at the time it foreclosed on the property. This suit, brought on the deficiency, was timely filed pursuant to § 212(d)(14) of FIRREA. Suit is being brought against Defendant Lively not on the promissory note, which he signed in his capacity as President of Gettysburg, but rather on the Guaranty which he signed in his individual capacity. Lively's claim that the Guaranty is back-dated fails pursuant to *D'Oench, supra,* 12 U.S.C. § 1823(e), and the holder in due course doctrine. Furthermore, the Guaranty is not limited, it is clear on its face and unequivicably covers this debt.

The defenses of failure of consideration, estoppel and duress cannot be used against the FDIC unless Defendant can show, in writing from the Board of Directors or Loan

Committee minutes evidence which supports the validity of these defenses. *See D'Oench, supra* and 12 U.S.C. § 1823(e). The claim of economic duress is also barred pursuant to *Langley v. FDIC*, 484 U.S. 86 (1987).

According to the evidence the FDIC owns the note in question. Both the Sigle affidavit and amended affidavit show that prior to the failure of United, United borrowed at the Federal Reserve Window and the Gettysburg note was part of the collateral used. Once United was declared insolvent, the FDIC paid the debt at the Federal Reserve Bank and received the Gettysburg note back. When a bank closes this is standard procedure. According to § 3.208 of the Texas Uniform Commercial Code repurchase by a payee is proper and the payee retains all its rights to the note.

The FDIC, as Receiver, owns the note in question. The evidence shows that when the FDIC closed United the transaction was a Deposit Insurance Transaction Purchase & Assumption in which the Receiver acquired all the assets. When a bank is closed, FDIC-Corporate indemnifies the purchasing bank. It takes no assets of the failed bank. Therefore, it is clear that FDIC-Receiver has brought suit in the proper capacity.

The Court is of the opinion Plaintiff has met its burden of proof concerning Defendant Lively's obligation to pay the alleged debt and Defendant has failed to adequately controvert Plaintiff's summary judgment evidence showing that the debt is owed. Therefore, it is

ORDERED that Plaintiff's motions for summary judgment (entries 27 & 39) are GRANTED. It is further

ORDERED that Plaintiff recover from Defendant the principal sum of $791,168.52 together with pre-judgment interest through September 30, 1990 of $270,763.88 plus interest thereafter of $249.27 per diem until the date of judgment and post-judgment interest at the rate of 7.28% per annum from the date of judgment until paid. It is further

ORDERED that Defendant pay Plaintiff reasonable attorney's fees of $25,000.00 pursuant to the affidavit of David Groveman. It is further

ORDERED that all other motions (entries 32 & 33) are denied as MOOT.

It is so ORDERED.

Signed this 7th day of December, 1990 at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITEDBANK-HOUSTON,,	§	
Plaintiff	§	
	§	
VS.	§	CIVIL ACTION
GETTYSBURG CORP., et al.,	§	NO. H-89-3081
Defendants.	§	
	§	

ORDER

Pending before the Court is Defendant Lively's motion for new trial and motion for stay of judgment. After careful review the Court finds that Defendant's motion is merely a reiteration of points considered by the Court when deciding Plaintiff's summary judgment and Defendants' related response. No new allegations have been made or issues raised. Therefore, it is

ORDERED that Defendant Lively's motion for new trial (entry #46) is DENIED. It is further

ORDERED that Defendant's motion for stay of judgment pending the disposition of the motion for new trial (entry #51) is DENIED as MOOT. It is further

ORDERED that the Federal Deposit Insurance Corporation's request for publication of opinion (entry #47) is GRANTED.

IT IS SO ORDERED.

Signed this 28th day of February, 1991 at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

APPENDIX E

GUARANTY

I, TRUITT V. LIVELY, request UNITEDBANK - HOUSTON, referred to herein as "Creditor", to grant credit to GETTYSBURG CORPORATION, of Harris County, Texas, referred to herein as the "Debtor", and in consideration of such credit I agree with the Creditor as follows:

1. "Indebtedness" and/or "Credit" as used herein means financing accommodation of any kind.

2. I hereby assent to all terms and agreements heretofore or hereafter made by the Debtor with the Creditor.

3. Without further authorization from or notice to me, Creditor may grant credit to Debtor from time to time. Either before or after revocation hereof and in such manner, on such terms, and for such times as it deems best and with or without notice to me, the Creditor may alter, compromise, accelerate, extend, or change the time or manner for the payment of the indebtedness, increase or reduce the rate of interest thereon, release or add any one or more guarantors, Debtors, or endorsers, accept additional or substituted security, or release or subordinate any security. No exercise or nonexercise by Creditor of any right hereby given it, no dealing by Creditor with Debtor or any guarantor or endorser, no change, impairment, or suspension of any right or remedy of Creditor shall in any way affect any of my obligations hereunder or any security furnished by me or give me any recourse against Creditor.

4. I guarantee unconditionally and promise to pay to Creditor or its order, in any coin or currency which at the time of payment is legal tender in the United States, each item of indebtedness hereby guaranteed and to perform each guaranteed obligation when due. If this instrument is signed by more than one guarantor, their respective obligations shall not be subject to proration and the aggregate liability of those whose liability is limited as aforesaid shall be the sum of the amounts set out above their respective signatures.

5. In addition to all liens and rights of setoff which Creditor may have against any property of Debtor or of mine, Creditor shall have a general lien on and a right of setoff against all my property now or hereafter in the possession of or on deposit with Creditor. Each such lien or right of setoff may be exercised with or without demand upon or notice to me, shall continue in full force unless specifically waived or released by Creditor, in writing, and shall not be deemed waived by any conduct of Creditor, by any failure to exercise such right, or by any neglect or failure in so doing.

6. Creditor need not take any action against Debtor, any other guarantor, or any other person, firm, or corporation or resort to any security held by it at any time before proceeding against me.

7. Until all indebtedness hereby guaranteed has been paid in full I shall not have any right of subrogation unless expressly given to me in writing by Creditor.

8. All existing or future indebtedness of Debtor to me is hereby subordinated to all indebtedness hereby

guaranteed and without the prior written consent of Creditor shall not be paid in whole or in part.

9. My liability shall continue notwithstanding the incapacity, death, or disability of any other or others or the revocation hereof by any other guarantor if there are more than one. The failure by Creditor to file or enforce a claim against the estate (either in administration, bankruptcy, or other proceeding) of Debtor or of any other or others shall not affect my liability hereunder, nor shall I be released from liability if recovery from Debtor, any other guarantor, or any other person, becomes barred by any statute of limitations or is otherwise prevented. I waive and agree not to assert or take advantage of the defense of the statute of limitations in any action hereunder.

10. I will file all claims against Debtor in any bankruptcy or other proceedings in which the filing of claims is required by law upon any indebtedness of Debtor to me and will assign to Creditor all of my rights thereunder. If I do not file any such claim, Creditor is hereby authorized, as my attorney in fact for such purpose hereby appointed, to do so in my name or in Creditor's discretion to assign the claim to and cause proof of claim to be filed in the name of Creditor's nominee. In all such cases, whether in administration, bankruptcy, or otherwise, the person or persons authorized to pay such claim shall pay to Creditor the full amount payable on the claim in the proceeding before making any payment to me, and to the full extent necessary for that purpose I hereby assign to Creditor all my rights to any payments or distributions to which I otherwise would be entitled. If

the amount so paid is greater than the guaranteed obligations then outstanding Creditor will pay the amount of the excess to the party entitled thereto.

11. With or without notice to me, Creditor, in its sole discretion, may apply all payments from Debtor, from me, or from any other guarantor under this or any other instrument, or realized from any security, in such manner and order of priority as Creditor may see fit, to any obligation of Debtor, whether or not such obligation is due at the time of such application.

12. All rights, powers and remedies of Creditor hereunder and under any other agreement now or at any time hereafter in force between Creditor and me shall be cumulative and not alternative and shall be in addition to all rights, powers, and remedies given to Creditor by law. No act, delay, omission or course of dealing between creditor and Debtor or Guarantors, or any of them, will be a waiver of Creditor's rights or remedies under this guaranty and no waiver, change, modification or discharge of this agreement or any obligation created hereby will be effective unless in writing signed by Creditor.

13. In case of default Creditor may maintain an action on this guaranty whether or not Debtor is joined thereon or separate action is brought against Debtor. The rights of Creditor are cumulative and shall not be exhausted by its exercise of any of its rights hereunder or otherwise against me or by any number of successive actions until and unless all indebtedness hereby guaranteed has been paid or performed and each of my obligations hereunder has been fully performed.

14. I hereby waive all notices whatsoever with respect to this guaranty or with respect to the underlying indebtedness, including, but without limitation, notice of: Creditor's acceptance hereof or its intention to act, or its action in reliance hereon; the present existence or future incurring of any of the Indebtedness or any terms or amount thereof or any change therein; any default by the Debtor of any surety, pledgor, guarantor, or grantor of security, including, without limitation, any of the guarantors; and the obtaining of any release of any guaranty or surety agreement (in addition to this guaranty), pledge, assignment, or other security of any of the Indebtedness.

15. I hereby waive notice of acceleration, notice of intention to accelerate, presentment, demand, protest, and notice of nonpayment in relation to any instrument evidencing the indebtedness, and any other demand and/or notice as may be required by law, except as such waiver may be expressly prohibited by law.

16. This is a continuing guaranty. Notice of its acceptance is waived. It shall remain in full force until and unless I deliver to Creditor written notice revoking it as to indebtedness incurred subsequent to such delivery. Such revocation shall not affect any of my obligations hereunder with respect to indebtedness theretofore incurred nor shall it affect any obligation of any other guarantor signing this guaranty.

17. I agree to pay to Creditor without demand reasonable attorneys' fees, which shall be no less than fifteen per cent (15%) of the sum owing to Bank hereunder, and all costs and other expenses incurred by it in collecting or

compromising any indebtedness of Debtor hereby guaranteed or in enforcing this guaranty against me, whether by suit or other means.

18. Should any one or more provisions of this guaranty be determined to be illegal or unenforceable, all other provisions nevertheless shall remain effective.

19. Wherever used herein, the word "undersigned" refers to every person executing this instrument, his heirs, successors, executors and administrators; the word "Bank" or "Creditor" refers to UNITEDBANK – HOUSTON, Houston, Texas, its corporate successors and, where it assigns any of the indebtedness, then so far as the assigned portion thereof is concerned, its assigns; and reference words singular in number or masculine in gender refer as well to more than one person and to corporations, associations, and females.

20. If more than one guarantor signs this agreement, the obligations of all such guarantors hereunder shall be joint and several and all words used herein in the singular shall be deemed to have been used in the plural when the context and construction so require. Any married woman who signs this guaranty agrees that recourses may be had against her separate property.

21. I agree that this guaranty shall be governed by the substantive law of the State of Texas, without regard to principles of conflicts of laws.

22. Any notice or consent required or permitted by this Guaranty shall be in writing and shall be deemed delivered if delivered in person or if sent by registered mail, postage prepaid, return receipt requested, to the

address shown below the guarantor's signature; unless such address is changed by written notice hereunder.

EXECUTED THIS THE 27th DAY OF September, 1985, at Houston, Harris County, Texas.

/s/ Truitt V. Lively
TRUITT V. LIVELY
Address: 10022 Moorberry
Houston, Texas
77080

THE STATE OF TEXAS)
COUNTY OF HARRIS)

This instrument was acknowledged before me on the 27th day of September, 1985, by TRUITT V. LIVELY.

/s/ Betty A. Duoto
Notary Public, Harris County, Texas
Printed Name:
Commission Expires

BETTY A. DUOTO
(Seal)Notary Public, State of Texas
My Comm. Expires July 29, 1989

APPENDIX F

NOTICE OF SUBSTITUTE TRUSTEE'S SALE

THE STATE OF TEXAS *
*
COUNTY OF HARRIS *

WHEREAS, the undersigned Substitute Trustee has been appointed by the FEDERAL DEPOSIT INSURANCE CORPORATION in its Capacity as Receiver for UNITED-BANK – HOUSTON, the beneficiary under that certain Deed of Trust dated September 27, 1985, executed by Triutt V. Lively as President of the Gettysburg Corporation, and filed for record in the Office of the County Clerk of Harris County, Texas, under Clerk's File No. K266621, Film Code No. 030-61-0430; and

WHEREAS, the note owned and held by the FEDERAL DEPOSIT INSURANCE CORPORATION in its Capacity as Receiver for UNITEDBANK-HOUSTON, is now in default and the said note is secured by the above described Deed of Trust;

NOW, THEREFORE, I will, as Substitute Trustee under the Deed of Trust, in order to satisfy the indebtedness secured thereby, and at the request of the holder of the said indebtedness, default having been made in the payment thereof, sell on Tuesday, October 6, 1987, (that being the first Tuesday of said month), at public auction to the highest bidder for cash before the courthouse of Harris County, Texas, in Houston, Texas, between the hours of 10:00 o'clock a.m. and 4:00 o'clock p.m. on that day, the following described property, to-wit:

Lot 13, Block 2; Lot 11, Block 5; Lots 15 and 16, Block 6; Lot 10, Block 7; Lots 14 and 26, Block 6; Lots 11, 13, and 16, Block 7; Lots 3 and 19, Block 7; Lot 20, Block 2; Lot 8, Block 6; Lot 21, Block 7; Lot 16, Block 2; Lots 13 and 20, Block 5; Lots 17 and 23, Block 6; Lot 10, Block 8; Lots 8 and17, Block 2; Lot 20, Block 6; Lots 2 and 9, Block 7; Lots 18, 19 and 24, Block 6; Lot 19, Block 8; Lot 14, Block 2; Lot 21, Block 5; Lot 28, Block 6; and Lots 1 and 17, Block 7; all in GETTYSBURG, SECTION ONE (1), an addition in Harris County, Texas, according to the map or plat thereof recorded in Volume 272, Page 104 of the Map Records of Harris County, Texas

WITNESS MY HAND on this ___ day of September, 1987.

/s/ _____
Andrew Allen,
Substitute Trustee

THE STATE OF TEXAS *
*
COUNTY OF HARRIS *

BEFORE ME, the undersigned authority, on this day personally appeared Andrew Allen for the FEDERAL DEPOSIT INSURANCE CORPORATION in its Capacity as Receiver for UNITEDBANK - HOUSTON, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated.

GIVEN under my hand and seal of office on this ___ day of ___, 19 ___.

/s/ NOTARY PUBLIC in and for
The State of Texas
Printed Name: Judy R. Dent
Expiration: 10/5/88

APPENDIX G

SUBSTITUTE TRUSTEE'S DEED

THE STATE OF TEXAS *
*
COUNTY OF HARRIS *

WHEREAS, by a certain Deed of Trust dated September 27, 1985, recorded in the Office of the County Clerk of Harris County, Texas, under Clerk's File No. K266621, Film Code No. 030-61-0430, of the Real Property Records of Harris County, Texas, Gettysburg Corporation as Grantor, conveyed to Edwin Lamm III, as Trustee, certain property hereinafter described, for the purposes of securing and enforcing payment of a certain note described in said Deed of Trust, of even date therewith and in the original principal sum of $926,926.56; and

WHEREAS, the FEDERAL DEPOSIT INSURANCE CORPORATION in its Capacity as Receiver for UNITED-BANK – Houston, the holder of said Note and Deed of Trust, as authorized by and provided in said Deed of Trust, appointed the undersigned to serve as Substitute Trustee and to enforce the trust, the said GETTYSBURG CORPORATION having made default in the payment of said Note; and

WHEREAS, I, as Substitute Trustee, did on the 6th day of October, 1987, after having posted written notice of the time, place and terms of a public sale of the hereinafter described property, which written notice was posted at the Courthouse door of Harris County, Texas, the county in which said real estate is situated, and which

said notice was posted for at least twenty-one (21) days preceding the date of the sale, sell the hereinafter described property at public vendue, at the courthouse door of Harris County, Texas, to Sam L. Olson, Jr.,Trustee, it being the highest bidder, for the sum of $170,000.00; and

WHEREAS, from the affidavit hereto attached and made a part hereof, it appears that the beneficiary (holder of the indebtedness above described) served notice of such Substitute Trustee's Sale by certified mail at least twenty-one (21) days preceding the date of sale on each debtor obligated to pay such indebtedness according to the records of the beneficiary and as required by law; and

WHEREAS, all prerequisites required by law and/or by said Deed of Trust have been duly satisfied by the beneficiary therein and by said Substitute Trustee:

NOW, THEREFORE, in consideration of the premises and of the payment to me of the sum of $170,000.00, by the said Sam L. Olson, Jr., Trustee, I, as Substitute Trustee, by virtue of the authority conferred upon me in writing by the said beneficiary of said Deed of Trust, have GRANTED, SOLD AND CONVEYED, and by these presents do GRANT, SELL AND CONVEY, unto the Sam L. Olson, Jr., Trustee, its successors and assigns, all of the following described property situated in Harris County, Texas: *Andrew Allen*

Lot 13, Block 2; Lot 11, Block 5; Lots 15 and 16, Block 6; Lot 10, Block 7; Lots ~~14 and~~ 26, Block 6; Lots 11, 13, and 16, Block 7; Lots 3 and 19, Block 7; Lot 20, Block 2; Lot 8, Block 6; Lot 21, Block 7; Lot 16, Block 2; Lots 13 and 20, Block 5; Lots 17 and 23, Block 6; Lot 10, Block 8; Lots 8 and 17,

Block 2; Lot 20, Block 6; Lots 2 and 9, Block 7; Lots 18, 19 and 24, Block 6; Lot 19, Block 8; Lot 14, Block 2; Lot 21, Block 5; Lot 28, Block 6; and Lots 1 and 17, Block 7; all in GETTYSBURG, SECTION ONE (1), an addition in Harris County, Texas, according to the map or plat thereof recorded in Volume 272, Page 104 of the Map Records of Harris County, Texas

TO HAVE AND TO HOLD the above described premises and property, together with the rights, privileges and appurtenances thereto belonging, unto the said Sam L. Olson, Jr., Trustee, its successors and assigns, forever; and I, as said Substitute Trustee, do hereby bind the said GETTYSBURG CORPORATION, its successors and assigns, to forever warrant and defend the said premises unto the said Sam L. Olson, Jr., Trustee, its successors and assigns forever, against the claim or claims of all persons claiming or to claim the same or any part thereof.

EXECUTED this 6th day of October, 1987.

/s/ Andrew Allen
Andrew Allen,
Substitute Trustee

THE STATE OF TEXAS *
*
COUNTY OF HARRIS *

BEFORE ME, the undersigned authority, on this day personally appeared Andrew Allen, Substitute Trustee, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me

that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated.

GIVEN under my hand and seal of office on this 6th day of October, 1987.

/s/ Ronald J. Dold
NOTARY PUBLIC in and for
The State of Texas
Printed Name: Ronald J. Dold
Commission Expires: 2/2/89

GRANTEE'S ADDRESS:
Sam L. Olson, Jr., Trustee
P.O. Box 19425
Houston, Tex. 77224

RETURN TO: GRANTEE

AFFIDAVIT

THE STATE OF TEXAS *
*
COUNTY OF HARRIS *

The undersigned, having knowledge of the matters hereinafter set forth, after being duly sworn, deposes and states under oath, as follows:

"FEDERAL DEPOSIT INSURANCE CORPORATION is its Capacity as receiver for UNITEDBANK - HOUSTON, the holder of the indebtedness secured by a Deed of Trust dated September 27, 1985, executed by the Gettysburg Corporation to Edwin Lamm III, Trustee, and

recorded under Clerk's File No. K266621, Film Code No. 030-61-0430, of the Real Property Records of Harris County, Texas, did at least twenty-one (21) days preceding the date of the sale made by Andrew Allen, Substitute Trustee, on the 6th day of October, 1987, serve written notice of the proposed sale, by certified mail, on each debtor obligated to pay such indebtedness according to the records of such holder, by the deposit of a copy of the Notice of Substitute Trustee's Sale, enclosed in a postpaid wrapper, properly addressed to each debtor at debtor's most recent address as shown by the records of the holder of such indebtedness, in a post office or official depository under the care and custody of the United States Postal Service, and a copy of the Notice of Substitute Trustee's Sale was filed in the office of the County Clerk of Harris County, Texas, being available for public inspection at least twenty-one (21) days preceding the date of the sale as described above; said notice also being posted at the Courthouse door of Harris County, Texas.

"I further certify that, to the best of my knowledge and belief, at all relevant times described in this affidavit, Earl Morrison and Truitt Lively were not active members of the armed services of the United States."

/s/ Andrew Allen
Andrew Allen

SUBSCRIBED AND SWORN TO before me, the undersigned authority, by the above-named Affiant, on this 6th day of October, 1987.

/s/ Ronald J. Dold
NOTARY PUBLIC in and for
The State of Texas
Printed Name:
RONALD J. DOLD
Commission Expires: 2/2/89

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION, in its Capacity as Receiver for UNITEDBANK-HOUSTON,	)	
Plaintiff	)	CIVIL ACTION
vs.	)	NO.
GETTYSBURG CORPORATION and TRUITT V. LIVELY,	)	H-89-3081
Defendants	)	

AFFIDAVIT OF TRUITT V. LIVELY

STATE OF TEXAS)
COUNTY OF HARRIS)

Before me the undersigned authority, on this day personally appeared Truitt V. Lively, who being by me duly sworn, upon oath deposes and says the following:

1. My name is Truitt V. Lively. I am over the age of twenty-one (21) years and of sound mind, capable of making this affidavit and fully competent to testify to the matters stated herein. I have personal knowledge of the matters herein stated and upon oath state that all statements contained herein are true and correct.

2. I am an officer of Gettysburg Corporation, who is the developer of Gettysburg Subdivision. Gettysburg

Corporation purchased 193 lots in this subdivision in November of 1982, of which 141 lots have been sold to various builders. Most of the lots were sold during 1983 and 1984. In 1985 thru 1987 the lot sales were slower than in 1983 and 1984; however the price of the lots increased in value. From the period of December 4, 1985 through August 7, 1987, (2 months before FDIC foreclosed on 34 lots) the price of each lot that was sold was $25,000.00. The last lot sold on August 7, 1987, before foreclosure by FDIC on October 6, 1987, at a price of $25,000.00.

3. On October 6, 1987, FDIC foreclosed on 34 lots, the collateral for an alleged debt of $876,157.22, at the Harris County Courthouse in Houston, Texas.

4. I have been active in the purchase of real property in Harris County, Texas since 1964 and have engaged in many purchase and sales transactions during the time since that date. I have personal knowledge of every sale that was made to the builders in Gettysburg Subdivision, particularly as to the sales made between December 4, 1985 and August 7, 1987.

5. In my opinion the value of each of the 34 lots sold at foreclosure by the FDIC on October 6, 1987 was a minimum of $22,000.00 for each of those lots.

Further affiant sayeth not.

/s/ Truitt V. Lively
Truitt V. Lively

Subscribed and sworn to before me on this 20th day of September, 1990.

(Seal)

/s/ Adala I. Ruhge
Notary Public in and for the
State of Texas

Supreme Court, U.S.
FILED
JUL 29 1992
OFFICE OF THE CLERK

No. 91-1894

In the Supreme Court of the United States

OCTOBER TERM, 1992

TRUITT V. LIVELY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR UNITEDBANK — HOUSTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ALFRED J. T. BYRNE
General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

RICHARD J. OSTERMAN, JR.
MICHAEL H. KRIMMINGER
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTIONS PRESENTED

1. 12 U.S.C. 1821(d)(2)(A) (Supp. II 1990) provides that, in its capacity as receiver of an insolvent financial institution, the Federal Deposit Insurance Corporation (FDIC) succeeds to the institution's "rights, titles, powers, and privileges"; under 12 U.S.C. 1821(d)(2)(B) (Supp. II 1990), the FDIC may "collect all obligations and money due the institution." The question presented is whether, pursuant to these provisions, the FDIC succeeed to an institution's rights under a guaranty.

2. Whether petitioner raised a genuine issue of material fact in challenging the validity of a foreclosure sale under Texas law.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1894

TRUITT V. LIVELY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR UNITEDBANK -- HOUSTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is unreported, but the judgment is noted at 952 F.2d 400 (Table). The opinion of the district court (Pet. App. 13-18) is reported at 760 F. Supp. 115.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1992. A petition for rehearing was denied on February 27, 1992. Pet. App. 9-10. The petition for a writ of certiorari was filed on May 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was the president of the Gettysburg Corporation. In September 1985, acting on behalf of Gettysburg, petitioner executed and delivered to United-Bank-Houston a promissory note for $926,926.56 and a deed of trust on real property owned by Gettysburg. Pet. App. 2. Petitioner also executed and delivered a personal guaranty of all debts owed by Gettysburg to United Bank-Houston. *Ibid.*

On April 30, 1987, the Texas Banking Commissioner declared UnitedBank-Houston insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) the federal receiver for the bank. Pet. App. 2. As receiver, the FDIC succeeded to all of the rights, titles, powers, and privileges of the bank. 12 U.S.C. 1821(d)(2)(A) (Supp. II 1990).

Gettysburg and petitioner subsequently defaulted on the note and the personal guaranty. Pet. App. 2-3. The FDIC proceeded with foreclosure under the deed of trust. It provided notice of the foreclosure sale on September 15, 1987. *Id.* at 3. On October 6, 1987, the property was sold at foreclosure for $170,000. *Ibid.* After the proceeds of the sale were applied to reduce the balance due on the note, a deficiency of $794,691.15 remained. *Ibid.*

2. In November 1988, the FDIC filed its original petition against petitioner and Gettysburg in Texas state court, seeking to recover the deficiency. Pet. App. 3. In September 1989, the FDIC removed the action to the United States District Court for the Southern District of Texas, as permitted under the then-recently enacted Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73, § 209(b), 103 Stat. 216. Pet. App. 3. The FDIC subsequently moved for summary judgment in its favor on all claims.

The district court granted summary judgment in favor of the FDIC. It held, in relevant part, that the FDIC was the proper party to enforce petitioner's obligations under the guaranty. It also held that petitioner had not established any material irregularities in the foreclosure sale. Pet. App. 15-17.

3. The Fifth Circuit affirmed in an unpublished, per curiam opinion. Pet. App. 1-8.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner first claims (Pet. 6-9) that his guaranty ran only to UnitedBank-Houston's corporate successors or assigns and that the FDIC did not qualify as either. Therefore, he argues, the FDIC could not enforce the guaranty. The court of appeals correctly rejected that argument. Pet. App. 7.

The FDIC was the successor to "all rights, titles, powers and privileges" of United-Bank Houston, pursuant to 12 U.S.C. 1821(d)(2)(A)(i) (Supp. II 1990). Under 12 U.S.C. 1821(d)(2)(B) (Supp. II 1990), the FDIC was entitled to "collect all obligations and money due the institution," as well as to "preserve and conserve [its] assets and property." These two provisions plainly empowered the FDIC to enforce petitioner's guaranty to United Bank-Houston. The guaranty conferred "rights" (12 U.S.C. 1821(d)(2)(A)(i) (Supp. II 1990)) upon United Bank-Houston as against petitioner, to which the FDIC succeeded when it was appointed receiver for the bank. Those rights included the right to "collect * * * money due [UnitedBank-Houston]" (12 U.S.C. 1821(d)(2)(B) (Supp. II 1990)) from petitioner as a result of his de-

faulting on the guaranty of Gettysburg's debt to the bank.

Contrary to petitioner's contention (Pet. 7), the court of appeals did not create a "new" category of successors who may enforce a guaranty. Instead, the court merely gave effect to statutory provisions that authorize the FDIC to enforce the debts due to the failed institution and thereby maximize the assets of the institution available for payment of creditors. Petitioner nevertheless argues that the guarantor of a debt has no obligation to the successor of the debt-holder if the succession occurs by operation of federal statute rather than by private agreement. Petitioner thus seeks to release personal guarantors of debts to financial institutions from any obligation to make good on their promise when the FDIC is appointed receiver. Petitioner does not explain, however, why such a windfall should be available to personal guarantors, alone among the obligors of the institution. Petitioner's position is squarely at odds with the plain purpose of 12 U.S.C. 1821(d)(2) (Supp. II 1990).

2. Petitioner also argues (Pet. 9-12) that the court of appeals erred in concluding that the foreclosure sale was proper under Texas law. In an effort to cast this argument as one appropriate for this Court's review, petitioner asserts that the court of appeals' interpretation of Texas law conflicts with the Ninth Circuit's interpretation of California law in *In re Worcester*, 811 F.2d 1224 (1987). Pet. 10. This effort is obviously unavailing; the two decisions apply the laws of different States to different sets of facts. Petitioner thus fails to establish a federal issue warranting further review. In any event, the courts below correctly determined that petitioner's state-law challenge to the foreclosure sale did not raise a triable fact.

Under Texas law, a foreclosure sale cannot be set aside unless the party challenging the sale can prove

both that the property was sold for a grossly inadequate price and that there was a material irregularity in the sale procedure. See, *e.g.*, *Savers Fed. Sav. & Loan Ass'n* v. *Reetz*, 888 F.2d 1497, 1503 (5th Cir. 1989); *American Sav. & Loan Ass'n* v. *Musick*, 531 S.W.2d 581, 587 (Tex. 1975); *Nautical Landings Marina, Inc.* v. *First Nat'l Bank in Port Lavaca*, 791 S.W.2d 293, 298 (Tex. Ct. App. 1990), writ denied (Dec. 19, 1990). Petitioner did not make either showing.

First, petitioner failed to show that the property was sold for a grossly inadequate price. The district court found that the price for which the property sold was "not deficient," observing that the property was sold for "over 85% of the appraised value." Pet. App. 15. The court of appeals summarily affirmed on this issue. *Id.* at 7. Although petitioner disputes this finding, he provides no reason why this Court should depart from its practice of declining to review factual findings concurred in by both courts below. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Under Texas law, petitioner's failure to establish that the sale price was grossly inadequate, standing alone, defeated his challenge to the sale.

Moreover, none of the aspects of the sale cited by petitioner had a material effect on the sale. Petitioner first asserts that an error in the notice of foreclosure sale "could have caused a chilling [effect on] the bidding." Pet. 10. Petitioner did not, however, present any evidence that the error—which consisted of the listing on the notice of a lot that was not subject to UnitedBank-Houston's lien—actually affected the sale. In the absence of evidence of actual prejudice, petitioner's mere speculation of a "chilling" effect was inadequate as a matter of law to set aside the sale. See *Diversified Developers, Inc.* v. *Texas First Mortgage REIT*, 592 S.W.2d 43, 44 (Tex. Civ. App. 1979).

Petitioner next asserts that the FDIC did not provide 21 days' notice of the sale, as required by law. Pet. 11. That assertion is incorrect. Notice of the scheduled foreclosure sale was mailed to petitioner Gettysburg on September 15, 1987; the sale occurred on October 6, 1987. Pet. App. A3. Counting the day of the sale, as is permitted under Texas law, 21 days elapsed. *Hausmann* v. *Texas Sav. & Loan Ass'n*, 585 S.W.2d 796, 801 (Tex. Civ. App. 1979), writ refused n.r.e. (Jan 23, 1980); *Hutson* v. *Sadler*, 501 S.W.2d 728 (Tex. Civ. App. 1973).

Finally, petitioner observes that the deed of trust contained a scrivener's error setting the time of sale as between 10:00 *P.M.* and 4:00 P.M., rather than between 10:00 *A.M.* and 4:00 P.M. Pet. 11. The time of the sale was accurately reported, however, in the notice of sale, as required by Texas Prop. Code § 51.002 (Vernon 1987), and the sale was actually held at 2:30 P.M. on October 6, 1987. FDIC C.A. Br. 31-32. In the absence of evidence of actual prejudice, errors of this sort do not suffice under Texas law to set aside a foreclosure sale. See *Nautical Landings Marina*, 791 S.W.2d at 299; *Jasper Fed. Sav. & Loan Ass'n* v. *Reddell*, 730 S.W.2d 672, 674-675 (Tex. 1987); *University Sav. Ass'n* v. *Springwoods Shopping Center*, 644 S.W.2d 705, 706 (Tex. 1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-1894

In The

Supreme Court of the United States

October Term, 1992

TRUITT V. LIVELY,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR UNITEDBANK-HOUSTON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

I.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE JUDGMENT BELOW, RELYING ON U.S.C. 12 § 1821(d)(2)(A) and (B), INCORRECTLY HELD THAT THE GUARANTY AGREEMENT EXTENDED TO THE FDIC AS RECEIVER FOR UNITEDBANK-HOUSTON. THE QUESTION PRESENTED IS WHETHER THIS HOLDING CONTRAVENES THE WELL-SETTLED LAW OF THE SUPREME COURT OF THE STATE OF TEXAS WHICH HOLDS THAT A GUARANTY MUST BE STRICTLY CONSTRUED AND MAY NOT BE EXTENDED BEYOND ITS PRECISE TERMS BY CONSTRUCTION OR IMPLICATION.

II.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE JUDGMENT BELOW HELD THAT THE FORECLOSURE SALE WAS PROPER AND COMPLIED WITH THE REQUIREMENTS OF THE TEXAS PROPERTY CODE, EVEN THOUGH THE PROPERTY DESCRIPTION IN THE NOTICE OF TRUSTEE'S SALE WAS INACCURATE. THE QUESTION PRESENTED IS WHETHER THE FIFTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH LAW OF THE NINTH CIRCUIT IN *IN RE NORMA C. WORCESTER, DEBTOR*, 811 F2d 1224 (9th Cir. 1987), WHICH HOLDS THAT AN INACCURATE DESCRIPTION OF PROPERTY IN NOTICE OF TRUSTEE'S SALE IS A MATERIAL IRREGULARITY RESULTING IN A GROSSLY INADEQUATE CONSIDERATION AND A VOID SALE.

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PETITIONER'S REPLY BRIEF

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of certiorari was filed on May 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ARGUMENT

1. Respondent stated in its Brief (Resp. 3) that the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals and, therefore, no further review by this Court is warranted.

Respondent fails to acknowledge that under Rule 10.1(a) of the Rules of Supreme Court of the United States that this Court may review a federal question decided by a United States Court of Appeals in a way in conflict with a state court of last resort.

The very essence of Petitioner's claim is that the judgment of the Fifth Circuit, relying on 12 U.S.C. § 1821(d) (A) and (B), incorrectly held that the guaranty agreement extended to the Respondent. This holding clearly contravenes the well-settled law of the Texas Supreme Court which holds that a guaranty must be construed strictly and may not be extended beyond its precise term by construction or implication.

Under 12 U.S.C. 1821(c) after the enactment of FIRRE of 1989 the federal law now states:

> "(3) Insured State depository institutions. (A) Appointment by appropriate State supervisor. Whenever the authority having supervision of any insured State depository institution (other than a District depository institution) *appoints a conservator or receiver* for such institution *and*

> *tenders appointment* to the Corporation, the Corporation *may accept* such appointment. (B) Additional powers. In addition to the powers conferred and the duties related to the exercise of such powers imposed by State law on any conservator or receiver appointed under the law of such State for an insured State depository institution, the Corporation, as conservator or receiver pursuant to an appointment described in subparagraph (A), shall have the powers conferred and the duties imposed by this section on the corporation as conservator or receiver".

12 U.S.C. § 1821(c) (3) references that the Corporation as receiver *shall* have the powers conferred and the duties imposed by this section on the Corporation as Receiver under 12 U.S.C. § 1821(d) (2) (A) and (B), which section is the subject of this review.

It is the contention of the Petitioner that the FIRRE Act of 1989 is not retroactive and the language used in 12 U.S.C. § 1821(c) (3) limits the authority conferred therein to only those appointments made subsequent to the enactment of the FIRRE Act of 1989. The specific terms – "Whenever the authority having supervision of any insured State depository institution, . . . , *appoints* a conservator or receiver for such institution and *tenders appointment* to the Corporation the Corporation *may accept* . . . " – dictate an action to take place in the future and would not be retroactive to appointments of receivers made prior to the FIRRE Act of 1989. Respondent was appointed receiver of UnitedBank-Houston on April 30, 1987, prior to the FIRRE Act of 1989.

Therefore, Petitioner contends that the Respondent has only those powers, if any, provided under 12 U.S.C.

1821(e) as it existed prior to the enactment of the FIRRE Act of 1989 stated as follows:

> "(e) Whenever any insured State bank (except a District bank) or any insured branch (other than a Federal branch) of a foreign bank shall have been closed by action of its board of directors or by the authority having supervision of such bank, as the case may be, on account of inability to meet the demands of its depositors, the Corporation shall accept appointment as receiver thereof, if such appointment is tendered by the authority having supervision of such bank and is authorized or permitted by State law. With respect to any such insured State bank or insured branch of a foreign bank, the *Corporation as such receiver shall possess all the rights, powers and privileges granted by State law to a receiver of a State bank.*"

Respondent (Resp. 4) states that contrary to Petitioner's contention, the court of appeals did not create a "new" category of successors who may enforce a guaranty. This contention by Respondent is contrary to the very obvious effect of the court of appeals decision which had to create a new category of "statutory successor" in order to circumvent the very clear wording of the guaranty. This new category of "statutory successor" can not be used to override the limitation of liability specifically provided in the guaranty under the laws of the Supreme Court of Texas.

Further, there is a defined question as to whether 12 U.S.C. § 1821(d) (A) and (B) specifically applies to the circumstances which arise under 12 U.S.C. § 1821(d) (E) where the corporation as receiver may place a failed bank

in liquidation and proceed to realize upon the assets of the institution, having the regard to the conditions of credit in the locality.

The Respondent did place UnitedBank-Houston in liquidation. Respondent would not be able to operate United Bank-Houston under the provisions of 12 U.S.C. § 1821(d) (A) and (B) because this section relates to a failed bank which continues to be operated under the direction of Respondent.

The Respondent under 12 U.S.C. § 1821(d) (E) must further take into consideration the conditions of credit in the locality. This is an added responsibility that is not provided under 12 U.S.C. § 1821(d) (A) and (B).

Contrary to Respondent's claim (Resp. 4), Petitioner does not contend that all personal guarantors of debt should have a windfall, alone among the obligors of the institution. It is the contention of Plaintiff that in the case before this Court that the guaranty agreement by its own terms provides the limitations, by contract, which prevent Respondent from succeeding to the rights of the failed bank.

The terms of the guaranty:

> "Whenever used herein, the word . . . "Bank" or "Creditor" refers to *United Bank-Houston,* Houston, Texas, its *corporate successor* and where it assigns any of the indebtedness, then so far as the assigned part in thereof is concerned, its assigns, . . . "

clearly define that only the bank itself, its corporate successor (not statutory successors by federal statute) and its assigns can assert any rights under the guaranty.

This particular guaranty may be the only one that the Respondent has had to confront where the guarantor provided for such protection, but it is definitively clear that Respondent can not assert any rights under this guaranty, where the laws of the State of Texas so clearly protect the guarantor when he contracts to limit his liability.

In a very recent case, *Vastine v. Bank of Dallas,* 808 S.W.2d 463 (Tex. 1991), the Supreme Court of Texas held that Texas courts apply the rule of *strictissimi juris* in interpreting guaranty agreements to refrain from extending the guarantor's obligation by implication beyond the written terms of the agreement.

The Supreme Court of Texas has consistantly applied this rule in determining liability of guarantors under guaranty agreements.

2. Respondent is clearly wrong by avering that Petitioner has failed to establish a federal issue warranting further review (Resp. 4). Similar facts are involved in both this case and *In Re Worchester,* 811 F2d 1224 (9th Cir. 1987), as both cases relate to improper descriptions of property in a foreclosure sale. Petitioner (Pet. App. F and App. G, pp. 28-35) clearly establish that the description of the property in the notice of trustee's sale was not exactly the same property conveyed by the trustee at the foreclosure sale. The court in *In Re Worchester,* held:

> "Under California law 'gross inadequacy of price coupled with even slight unfairness or irregularity is a sufficient basis for setting the sale aside:. . . .

> Inquiry would have disclosed that the Notice of Trustee's Sale also misdescribed the property subject to foreclosure and thereby put Rosner and Little on notice that there was an irregularity in the sale that may have prejudiced Worchester by discouraging buyers interested only in residential properties."

The further fact that the record before the trial court had an affidavit signed by Petitioner (Pet. App. H, pp. 37-39) declaring that the property was worth $748,000 when the trustee sold the property for $170,000, is clearly sufficient evidence to meet the requirement under Texas law that a foreclosure sale can be set aside if the party challenging the sale can prove both that the property was sold for a grossly inadequate consideration and that there was a material irregularity in the sale procedure. *American Savings & Loan Assn. v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975).

Clearly, the Fifth Circuit case before this Court which holds there was no irregularity even though there was an improper property description in the Notice of Foreclosure Sale, conflicts with the law propounded in the Ninth Circuit which holds that an irregularity in a description along with grossly inadequate consideration merits setting aside a foreclosure sale.

Respondent in its Brief (Resp. 5) contends that none of the aspects of the sale cited by Petitioner had a material effect on the sale. It is evident from the fact that potential bidders upon reviewing the list of lots described in the Notice of Trustee's Sale, and identifying a lot that

has an expensive home built on it and included wrongfully in the list of lots to be sold, would certainly be chilled in its decision to bid for the remaining lots.

Respondent relies on the decision of the appellate court in *Diversified Developers Inc. v. Texas Mortgage REIT*, 592 S.W.2d 43, 44 (Tex. Civ. App. 1979) to support its position. However, the Texas court found that the question of the validity of a trustee's sale, when previously released acreage was wrongfully advertised for sale in the foreclosure notice, has not been addressed or determined by a Texas court. This point has not been addressed by the Supreme Court of Texas.

CONCLUSION

For all the reasons set forth herein, Petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit. Petition submits that it is appropriate for this Court to make a summary disposition on the merits pursuant to Sup. Ct. R. 16.1 and reverse and remand the case to the District Court for resolution of any remaining issues.

Respectfully submitted,

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DATED: August 24, 1992